IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 263 OF 2007

KJMC Financial Services Ltd. a Company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at 168, Atlanta, Nariman Point, Mumbai 400 021 ..Petitioner

versus

1. M/s. Satyagiri Waterways Ltd. a Company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400 025
2. M/s. Satyagiri Shipping Company Ltd., a Company incorporated under the provisions of the Companies Act, 1956 having its Registered office at 208, T.V. Industrial Estate, 1st floor, Behind Glaxo Worli, Mumbai 400 026
3. M/s. Gammon Infrastructure Projects and Investments Ltd a Company incorporated under the provisions of the Companies Act, 1956, having its Registered office at Fortune 2000 Building, Plot C-B, Block - G, Bandra-Kurla Complex, Bandra (East), Mumbai 400051
4. Tulip Hospitality Services Ltd. a Company incorporated under the provisions of the Companies Act, 1956, having its office at Indra Palace, H-Block, Connaught Circus, New Delhi - 110 001

5. Videocon Industries Ltd., a Public Limited Company duly incorporated under the provisions of the Companies Act, 1956 having its Registered office at 14 KM Stone, Aurangabad - Paithan Road, Village Chitegaon, Taluka Paithan, Dist: Aurangabad & administrative office at Fort House, Dr. D. N. Road, Fort, Mumbai 400 001]
6. Mr. Nitin Joshi, of Mumbai Indian Inhabitant, residing at 301-B, Purnima Apartment Peddar Road, Mumbai 400026]..Respondents

Mr. Rohit Kapadia, Sr. Advocate with Mr. Pradip Sancheti and Mr. R. A. Shah i/b. M/s. Mansukhlal Hiralal & Co, for the Petitioner.

Mr. Aspi Chinoy, Sr. Advocate and Mr. Milind Vasudeo with Mr. Archit Jaykar and Ms. Megha Sen and Ms. Uma Vyavaharkar i/b. M/s. Khaitan & Jayakar for the Respondent Nos. 1, 2 and 6.

WITH

ARBITRATION PETITION NO. 330 OF 2007

Videocon Industries Ltd. a Public Limited Company duly incorporated under the provisions of the Companies Act, 1956, having its registered Office at 14 K. M. Stone Aurangabad -Paithan Road, Village Chitegaon, Taluka Paithan, Dist:Aurangabad and Administrative Office at Fort House, D. N. Road, Fort, Mumbai 400 001]..Petitioner

versus

1. M/s. Satyagiri Shipping]

Company Ltd., a Company incorporated under the provisions of the Companies Act, 1956 having its Registered office at Gamon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400 025]

2. M/s. Gammon Infrastructure Projects and Investments Ltd a Company incorporated under the provisions of the Companies Act, 1956, having its Registered office at Fortune 2000 Building, Plot C-B, Block - G, Bandra-Kurla Complex, Bandra (East), Mumbai 400051]

3. Tulip Hospitality Services Ltd. a Company incorporated under the provisions of the Companies Act, 1956, having its office at Indra Palace, H-Block, Connaught Circus, New Delhi - 110 001]

4. M/s. Satyagiri Waterways Ltd. a Company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400 025]

5. KJMC Financial Services Ltd a Company incorporated under the provisions of the Companies Act, 1956 having its Registered Office at 168, Atlanta, Nariman Point, Mumbai 400 021]

6. Mr. Nitin Joshi, of Mumbai Indian Inhabitant, residing at 301-B, Purnima Apartment Peddar Road, Mumbai 400026]

7. ABS Hovercraft Ltd., (ABS) having their registered office at Coopers House, the Horsefair Romsey,]

Hamsphire, S051 8JZ]
England]..Respondents

Mr. R. D. Soni with Mr. M. A. Sayyed i/b. M/s. Ram & Co. for the petitioner.

Mr. Aspi Chinoy, Sr. Advocate and Mr. Archit Jaykar with Ms. Megha Sen and Ms. Uma Vyavaharkar i/b. M/s. Khaitan & Jayakar for the Respondent Nos. 1, 4 and 6.

Mr. Rohit Kapadia, Sr. Advocate with Mr. Pradeep Sancheti and Mr. R. A. Shah i/b. M/s. Mansukhlal Hiralal & Co. for the Respondent No.5.

CORAM : S. A. BOBDE, J.
DATE : 6TH DECEMBER, 2007.

ORAL ORDER :

. Both these Arbitration Petitions are under Section 9 of the Arbitration and Conciliation Act, 1996, for interim reliefs to the effect that the Respondents be restrained from obstructing the Petitioner KJMC Financial Service Ltd. from participating in the meeting of the Board of Directors of the respondent No.1 and /or consortium members. The Respondent No.1 is a company which is formed as a Special Purpose Vehicle (SPV) for a consortium of KJMC Financial Services Ltd., in which other Respondents and KJMC Financial Services Ltd. (KJMC) are members. A Consortium has been formed in

order to bid for a project of the Maharashtra State Road Development Corporation (MSRDC) for development of Passenger Water Transport System on the west coast of Mumbai on Build, Own Operate and Transfer Basis. The Members of the Consortium executed a Consortium Agreement on 18th August, 2003. Thereafter, one member, viz. ABS Hovercraft Ltd. dropped out. The Constorium members then executed a Supplementary Consortium Agreement dated 30th April, 2004.

2. The MSRDC by Letter of Intent dated 5th February, 2004 informed the Respondents M/s. Satyagiri Shipping Company Ltd. that the consortium was selected as the preferred bidder for the development and implementation of the project. The problem which gave rise to this litigation began thereafter. Apparently, KJMC Financial Services Ltd. the Petitioner in Arbitration Petition No. 263 of 2007 was dissatisfied to a large extent in the way the consortium was functioning and wrote a letter dated 15th September, 2006 and pointed out mal functioning and unequivocally stating that the two MOUs which constitute a Consortium on 8th August, 2003 and 30th April, 2004 stand cancelled

and the consortium stands dissolved. KJMC further stated that the MOUs have come to an end and they are discharged from any obligation thereunder. That consequently, the consortium also stood automatically dissolved. There is no dispute that KJMC did wrote such a letter.

3. Therefore according to the Respondent No. 2 in July, 2007 the Consortium decided to fill up the position of KJMC by inducting three other partners which has been done sometime on 12th July, 2007. This Arbitration Petition No. 263 of 2007 was filed on 16th July, 2007. The other Arbitration Petition No. 330 of 2007 was filed on 30th May, 2007.

4. Before going into the merits of the contentions on behalf of the petitioner in Arbitration Petition No. 263 of 2007 filed by KJMC, it is necessary to consider the petitioner’s conduct which is pointed out by Mr. Chinoy, learned counsel for the Respondent Nos. 1, 2 and 6, as conduct disentitling the petitioner to equitable relief by way of injunction. According to the learned counsel for the Respondent Nos. 1, 2 and 6, the Petitioner is not entitled to any relief as prayed for since

the petitioner has voluntarily and of its own free will repudiated the MOUs and disassociated itself from the consortium by a letter dated 15th September, 2006 and have further suppressed this letter from this court. This letter is annexed to the respondents reply at Exhibit 'A'. By that letter KJMC has after alleging certain illegalities in the functioning of the respondent No.2 stated as follows:

> "We accept the repudiation and treat the Supplementary MOU dated 30th April 2004 (read with the earlier MOU dated 18th August 2003 to an end) and state that we are discharged from our obligation to perform the same. The Supplementary MOU dated 30th April, 2004 as read with MOU of 18th August 2003 therefore stand cancelled / terminated and the consortium stands dissolved. By your aforesaid conduct you have made it impossible to perform the subject MOUs.
>
> 13. Kindly note that we are separately informing all the concerned authorities of the two MOUs having come to an end and discharge of our obligations under the two MOUs. Consequently the consortium also stands automatically dissolved."

The petitioner KJMC having done so according to the Respondent Nos. 1, 4 and 6 is now not entitled to have any say in events subsequent to such repudiation and seek any reliefs. Indeed on

primafacie view of the matter, the petitioner had disassociated itself entirely from this project as also repudiated MOUs, on the clauses of which they seek to rely.

5. Mr. Kapadia, learned counsel for the petitioner however submitted that the petitioner in the subsequent meeting with MSRDC stated that they were part of the consortium. Mr. Kapadia relied on a letter dated 9th July, 2007. This letter is written by the petitioner to the respondents stating that at the instance of the Vice Chairman and Managing Director of the MSRDC a meeting of the consortium was held in which the representative of the petitioner categorically answered and confirmed that they continue to remain consortium members as per the terms of the MOU dated 18th August, 2003 and Supplementary MOU dated 30th April, 2004. However, even till this date there is no specific withdrawal of the cancellation of the original letter dated 15th September, 2006 there is no unequivocal withdrawal of the letter dated 15th September, 2006. Be that as it may, it is clear that the letter dated 15th September, 2006 constitutes an important event from the point of view of both parties.

6. The contention of Mr. Chinoy is that the petitioners have wilfully and deliberately suppressed this letter dated 15th September, 2006 from this court and are therefore not entitled to any equitable relief. Mr. Kapadia while accepting the fact that the letter dated 15th September, 2006 has been withheld from the court, however, submitted that reference is made to that letter in another letter dated 9th July, 2007 and therefore the petitioners ought not to be taken as having suppressed this letter.

7. It is interesting to note that the petitioners have not even referred to the event i.e. their having written a letter on 15th September, 2006 completely disassociating from the joint venture of project and repudiating MOUs. Though there are detailed averments made in the petition, it is curious that this event, viz. that the petitioners repudiated the MOUs of the Consortium and purported to terminate and dissolve the consortium is not even referred to in the pleadings. This letter dated 15th September, 2006 has come to the light only because it had been filed by the

Respondent along with their reply. The only inference that can be drawn from the absence of this letter and the absence of even a reference to the events incorporated in the letter is that the petitioners deliberately withheld an important fact from this court probably apprehending that it would disentitle them to relief. In the circumstances, it is not possible to accept the contention that the petitioners did not deliberately refer this fact from the court because the fact is referred to in some other letter, which is filed along with the petition without any reference to the said letter or its contents in the petition.

8. Mr. Kapadia, learned counsel for the petitioner however submitted that withholding of a particular document cannot be treated as suppression, particularly since no order had been obtained and because in any case the respondents were there to produce that document. This contention is clearly not acceptable. In view of the Judgment of the Supreme Court in the case of **S. P. Chengalvaraya Naidu vs. Jagannath (AIR 1994 SC 853)** relied upon by Mr. Chinoy. Paragraph 8 of the said judgment reads as under:

> "The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants - defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the court as well as on the opposite party."

It cannot be the law that a party is denied relief for suppressing a material document from the court only if it has obtained some order favourable to it and the suppression must be condoned if the court has not passed any order yet.

. Similarly, this court has surveyed and dealt with the entire law on the point in an **unreported judgment in Appeal No. 332 of 1991 in the case of Maganlal Kuberdas Kapadia vs. Themis Chemicals Ltd. And M/s. Orgachem Enterprises & Ors. decided by a Division Bench of P.D. Desai C.J. and K. Sukumaran on 22nd April, 1991,** where this court has observed as follows:

> "A Court of Law exercising discretionary power in such matters, rightly insists on a party approaching the Court with clear clean hands. The message has its enduring value; and has preserved itself all through the ages. Litigants who want only disregard this basic principle do so at their peril. This case rightly attracts those salutary principles; and it is a clear illustration where the application of the principle is fully justified."

Having regard to the circumstances of the case and the law applicable thereto, I am of view that the petitioners are disentitled to any equitable relief for having withheld the letter dated 15th September, 2006 and the events incorporated in that letter, namely, that they had themselves repudiated the MOUs.

9. As regards the case of the petitioner

Videocon Industries Ltd. in Arbitration Petition No. 330 of 2007, it is clear in the first instance that this petitioners is not directly affected prejudicially or otherwise by any action of the respondents. This petitioner has never been inducted on the Board of SPV which was formed in pursuance of the MOUs of the consortium. Neither has this petitioner been removed from the consortium, its shareholders are also unaffected and in fact not even member of the Board of Directors. However it was contended by Mr. Soni learned counsel for the petitioner that the petitioner has a grievance because the petitioner is entitled to consider other shareholdings of KJMC which has been removed from the consortium. Mr. Soni, relied upon clause 2.08 of the Supplementary Memorandum of Understanding which reads as follows :

> "2.8. Subject to the terms and conditions of the Bid Documents / LOI / the financing documents entered into by all parties, if a party hereto desires to sell its Shares or any part thereof, it shall offer the first right of purchase / refusal to the other Key Promoters of the consortium."

Ex-facie this clause has no application in the present case since admittedly the KJMC or for that purpose any member of SPV did not hold any shares

since none were issued, clearly, therefore, there is no occasion for sale or first right of purchase of the shares since none have been sold.

10. It was next contended by Mr. Soni that the respondents must be injuncted from inducting any third persons, which they already have and be directed to continue with the original composition of consortium in view of clause 'h' of the Memorandum of Understanding dated 8th August, 2003, which reads as follows:

> "None of the parties to this MOU shall have power to commit on behalf of the other party (parties) without express and written consent of the other party (parties) in respect of such a commitment."

According to Mr. Soni, due to this clause a decision to remove a member and or to induct another must be unanimous. A reading of the clause, however does not indicate that this clause governs the question of removal or induction of the members of consortium. The clause merely prevents any other parties in their capacities as members of the consortium from making any commitment on behalf of any other members of the consortium without express or written consent of such other party. It does not

regulate the powers or functions of the Consortium. This clause therefore does not render the respondents action illegal in any way.

11. Mr. Soni, learned counsel for the petitioner also urged that the action of the respondents in removing KJMC is illegal and must be injuncted by virtue of clause 5.02 of the Supplementary Memorandum of Understanding dated 30th April, 2004, which reads as follows:

> "All the resolutions shall be passed by the Board unanimously by concurrence of all Directors present and voting, so as to maintain harmony."

12. In the first place, this petitioner (Viedecon) is not entitled to make this grievance since it does not appear to have the necessary locus to make this grievance, because it is not in any way affected by the action of removal of KJMC by the respondents. Moreover the clause governs the actions of the Board of Directors of SVP and there is no removal of KJMC from the Board of Directors of SPV. Even though Mr. Chinoy learned counsel for the respondents stated that the Board of the SPV has been formerly constituted no one has been allotted

any shares and there is no action of removal or induction of any member from the Board of Directors.

13. It was lastly urged by Mr. Soni, learned counsel for the petitioner that the action of removal of KJMC will result in a failure of the project. On the other hand it is the contention of the Mr. Chinoy learned counsel for the Respondents have not removed any one; the KJMC has voluntarily disassociated from the project and now wants to force itself back. According to him in such a situation the continuation of such a party would be prejudicial to the success of the project. Be that as it may, the court cannot be invited to decide on the legality or equitability of an action on rival projection of the success or failure of a project and the best way in which it should be managed for success.

14. In this view of the matter, there is no merit in both the petitions which are hereby dismissed.

15. Mr. Soni, learned counsel prays for maintenance of statusquo. I am not inclined to

grant such an order for the first time in view of the observations made hereinabove.

(S. A. BOBDE, J.)